LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 602

ROBERT E. GOLLAHER, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GERALD H. GOTTLIEB,
EARL KLEIN,
315 South Beverly Drive,
Suite 315,
Beverly Hills, Calif. 90212,
(213) 272-8621,
Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 6

1. Defendants' Right to Be Free of Compulsory Self-Incrimination and Their Right to Counsel Were Violated in an Aggravated Form, There Being Six Additional Elements of Aggravation Not Present in the Stationhouse Interrogation Considered in Miranda v. Arizona 6

   a. Introductory 6

   b. Miranda Warnings 7

   c. Immunity From Prosecution 15

2. The Sentencing Judge Made Defendant Gollaher Pay a Price for Testifying at His Trial and for Defending Himself by Imposing a Harsher Sentence and by Denying Probation Because Gollaher Refused to Confess His Guilt, Post Conviction. This Practice Is the Subject of a Conflict Between the Ninth and Tenth Circuits and the District of Columbia (Scott v. U.S., Feb. 13, 1969) and Fifth (Thomas v. U.S., 368 F. 2d 941) Circuits 18

3. Where a Prosecutor Makes a Civil Agency Into His Agent, and the Federal Government's Several Involved Agencies Then Pro-

Page

ceed to Impose a Series of Punishments and Jeopardies for Precisely the Same Alleged Acts on Precisely the Same Defendants, the Federal Government Has Thereby Committed the Constitutional Violation of "Double" Jeopardy and Punishment. Here the Jeopardy Is Not Double, but Multiple. The Violation Extends Not Only to the Guarantee Against Multiple Jeopardy and Punishment, but Also to the Broad Guarantee of Fairness, Viz., Due Process. A Review of the Events Makes This Clear 23

Conclusion 29

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit 1
Order 23

Appendix B. Pertinent Amendments and Statute Involved 24

TABLE OF AUTHORITIES CITED

Cases	Page
Cummings v. Missouri, 71 U.S. 277	25, 26
Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975	12
Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977	14, 15
Garland, Ex parte, 71 U.S. 333	25
Green v. U.S., 355 U.S. 184	27, 28, 29
Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709	12
Hensley v. United States, 406 F. 2d 481	12
Lange, Ex parte, 85 U.S. (18 Wall.) 163	24
Mattox v. Carson, 295 F. Supp. 1054	9, 11
Miranda v. Arizona, 384 U.S. 436	2, 8, 9, 11, 14, 15, 17
Nielsen, In re, 131 U.S. 176	24
Powell v. United States, 226 F. 2d 269	17
Scott v. United States (No. 20,954, D.C. Cir. Feb. 13, 1969) 37 Law Week 2463	19, 20, 21, 22
Snow, In re, 120 U.S. 275	24
Spevack v. Klein, 385 U.S. 511	22, 26
State v. Hennessey, 245 P. 2d 875, 195 Or. 355	9
Thomas v. U.S., 368 F. 2d 941	20, 21
Trop v. Dulles, 356 U.S. 86	24
United States v. Armco Steel Corporation, 252 F. Supp. 364	27
United States v. Chouteau, 102 U.S. 603	25
United States v. Edgerton, 80 Fed. 374	15

Page

United States v. LaFranca, 282 U.S. 568 25

United States v. Lawn, 115 F. Supp. 674 15

United States v. Wylie, 278 F. 2d 500 22

Miscellaneous

Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. pp. 188, 190, 191 13

Statutes

Revised Rules of Supreme Court of the United States, Rule 22(2) 2

Statutes

United States Code, Title 18, Sec. 307 3

United States Code, Title 18, Sec. 1001 3

United States Code, Title 18, Sec. 1010 3

United States Code, Title 18, Sec. 3481 .....3, 4, 8

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 28, Sec. 1291 3

United States Constitution, Fifth Amendment 2, 3, 4, 6, 17, 22, 25, 27, 29

United States Constitution, Sixth Amendment 2, 3, 6, 17, 29

United States Constitution, Eighth Amendment ..3, 24

Textbook

49 Minnesota Law Review, pp. 47, 64 14

IN THE

Supreme Court of the United States

October Term, 1969
No. .....

ROBERT E. GOLLAHER, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Robert E. Gollaher and Gollaher Construction, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 19, 1969, affirming the judgment of the United States District Court for the Eastern District of California at Fresno, in favor of respondent.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered on August 19, 1969, and is not as yet officially reported. It is printed as Appendix A to this petition. (The Court had rendered an opinion on December 19, 1968, but upon timely petition for rehearing, the original opinion was withdrawn and the August 19, 1969 opinion appearing in

Appendix A, was rendered in its place. The earlier withdrawn opinion is not reproduced here, because it is not material. Except for additional material in the August 19 opinion, the earlier opinion is the same.)

Jurisdiction.

The judgment of the Court of Appeals was entered on August 19, 1969. This is a criminal case. Jurisdiction of this Court is conferred by Title 28 U.S.C. Section 1254(1) and Rule 22(2) of Revised Rules, Supreme Court of the United States.

Questions Presented.

1. Whether a federal grand jury proceeding constitutes such a critical stage of prosecution that a witness under subpena, who is told he is a potential defendant is entitled to the safeguards of *Miranda v. Arizona,* 384 U.S. 436, including the warning of a right to refuse to testify at all. If such safeguards are required and not provided, is it a violation of the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel to introduce any of the grand jury testimony to support conviction at trial? Is such a defendant immune from prosecution on the subject of the grand jury inquiry?

2. Whether a sentencing judge may refuse probation and impose a harsher sentence againt a criminal defendant because defendant, having stood trial and having testified in his own behalf, has refused to confess his guilt after conviction. Is such sentencing procedure a violation of the Fifth Amendment right against self-incrimination and a violation of the Sixth Amendment right to defend oneself at trial.

3. Whether it is a violation of the Fifth Amendment rights to Due Process of Law and against double prosecution and double punishment and a violation of Eighth Amendment right against cruel and unusual punishment for the government to bring criminal charges against a building contractor, after two agencies of the government have suspended the contractor from his right to conduct business and have forced him out of business for the same alleged acts and transactions, where the suspension has caused the contractor extensive financial loss, and where the two governmental agencies have refused to grant the contractor an administrative hearing on the suspension on request of the United States Attorney, until after criminal proceedings are over.

Constitutional Provisions and Statutes Involved.

Constitutional provisions involved are the Fifth, Sixth and Eighth Amendments to the Constitution of the United States.

Statutory provision involved is Title 18 U.S.C., Section 3481.

All are set forth in relevant part in Appendix B.

Statement of the Case.

This is a criminal case. Jurisdiction of the District Court was founded on Title 18 U.S.C. Sections 307, 1001 and 1010. Jurisdiction of the Court of Appeals was based on Title 28 U.S.C. Section 1291.

Appellants were indicted in fifteen counts and charged with conspiracy to make, and making, false statements to the federal government and its agencies in connection with home loan guarantees. Appellant Rob-

ert E. Gollaher (hereafter Gollaher) was president of appellant Gollaher Construction, Inc. (hereafter appellant corporation), which was a construction company building tract homes in the Fresno, California area. Appellants were convicted of six counts only. The charges involved alleged misstatements made on Federal Housing Administration and Veterans Administration loan guarantee applications. It was charged that appellants paid veterans and others for use of their home loan entitlements and caused the veterans and others to apply for VA and FHA home loan guarantees, when in fact they had no intention of residing in the homes. Other claims involved alleged misstatement of amounts of deposit [R. 1-20; 217].

The government had been investigating the question of irregularities in the Fresno area, including the operations of appellants, since 1963. In February 1965, Gollaher was subpenaed to appear in March 1965 before the federal grand jury for questioning as to his activities in the sale of homes. Although Gollaher was told before the grand jury that he was a potential defendant, he was not advised of his right under the Fifth Amendment and Title 18 U.S.C. Section 3481 that he could refuse to testify at all. He did testify. His testimony before the federal grand jury was used to indict him and appellant corporation, and at trial certain of his statements before the grand jury were used to impeach his trial testimony and also had the legal effect not only of impeachment, but also of affirmative evidence.

The trial commenced October 18, 1966 [R. 33-34 and Exhibits thereto; 92-93; Rep. Tr. 1081-1085; 1135].

Prior to the time that appellants were indicted, both the VA and the FHA notified appellants that they were suspended from receipt of loan guarantees to processed through those agencies, and further informed appellants that they were entitled to a hearing on the suspension. When appellants requested a hearing, they were told that they could have a hearing after criminal proceedings were instituted and completed. The criminal proceedings had not yet been initiated and no indictment had yet been returned. Appellants, in the midst of a million dollar housing tract development, were put out of business prior to the time that the indictment was returned for the same alleged acts and transactions which were later the foundation for the indictment. [R. 33-34 and Exhibits thereto]

Appellant Gollaher testified in his own defense at his trial. Upon conviction and at the time of sentencing, the trial judge stated that he would not consider probation for appellant Gollaher, although Gollaher had no prior criminal record of any kind, because in the judge's view, appellant had failed to confess his guilt and had lied on the witness stand. The court then levied a substantial fine and a jail sentence [Rep. Tr. 1478-1479; 1484-1485].

A co-defendant, who admitted complicity in the acts charged, and who had testified for the prosecution received a suspended sentence after a plea of *nolo contendere* [R. 245].

REASONS FOR GRANTING THE WRIT.

1. Defendants' Right to Be Free of Compulsory Self-Incrimination and Their Right to Counsel Were Violated in an Aggravated Form, There Being Six Additional Elements of Aggravation Not Present in the Stationhouse Interrogation Considered in Miranda v. Arizona.

a. Introductory.

Inquiry under oath of a person then-declared by the government to be a "potential defendant" violates the Fifth Amendment right against self-incrimination, and the Sixth Amendment right to counsel, and the fact that the episode occurred in a federal grand jury proceeding only aggravates the violation of those constitutional guarantees because:

a. The person being under subpena was thereby under legal compulsion to attend and testify;

b. As compared to, say, the stationhouse, the subject is placed under oath and any misadventure could result in the jeopardy of perjury, making the grand jury appearance far more dangerous than that in the police station;

c. The likelihood of securing proof of coercive pressures in interrogation is even less in the grand jury proceeding where secrecy is imposed, then in the stationhouse, where there is no confidentiality imposed by law on relating events which have transpired;

d. The relationship between the grand jurors and the prosecuting officer is usually such as to only increase the coercive atmosphere because of the pressure of numbers arrayed against the potential defendant and because the grand jurors, untrained laymen, look

to the prosecutor as one with authority and specialized knowledge of the law;

e. Coercion can be lessened or eliminated in the stationhouse by the presence of the subject's attorney; in the grand jury room, the subject is prevented in practice and systematically from having an attorney present, so that the prosecutor's zeal is not dampened by the possibility that the witness will call for his lawyer.

f. Moreover here, questions were asked in the grand jury room of the defendants, which would have been objected to if an attorney or presiding legal officer had been present.

It is emphasized that points a. through f. are factors-in-aggravation. The aggravations are but superimposed on the foundational rule that a person may not be caused to testify against himself or **at all** without his consent and to do so requires the quashing of the indictment. Nor can the violation of the right against self-incrimination be cured by the presence of counsel because, as noted, a potential defendant's counsel is systematically excluded.

It necessarily therefore follows that eliciting testimony from a person being considered for prosecution, whether inside or outside the grand jury room, is an election by the government to grant him immunity. Whether or not the prosecution uses the fruits of the grand jury testimony of the subject (and here the prosecution did) the indictment must be quashed and the prosecution dismissed.

b. Miranda Warnings.

Prior to the time appellant Gollaher was subpenaed before the federal grand jury, the government was al-

ready investigating him and appellant corporation. He was told by the United States Attorney at the grand jury hearing that he was regarded as a "potential defendant." He was also given certain warnings, which are not clear from the record. There is no question, however, that he was not given the warnings required by *Miranda v. Arizona.* This grand jury appearance in March 1965 preceded the handing down of that decision. However, Title 18 U.S.C., Section 3481, which provides that a defendant shall be a witness at his own request only, and therefore gives a potential defendant the right to refuse to testify at all, was in full force and effect. There is no indication in the record that appellant Gollaher was told that he could refuse to testify at all. He did testify and made certain statements which form the basis for his and appellant coporation's indictment and those statements were used to impeach his trial testimony and supported the convictions.

The trial started October 18, 1966, after *Miranda v. Arizona,* had been handed down. The Court of Appeals for the Ninth Circuit in its opinion held that a witness under subpena before the federal grand jury is not in custody and, therefore, the *Miranda* rules are not applicable to grand jury interrogation. Opinion p. 5. It should be borne in mind that the practice prevalent in investigation of so-called white collar crimes, particularly on the federal level, is to call potential defendants before the grand jury for investigation. Seldom are such potential defendants questioned by law enforcement officers, as in crimes of violence. The grand jury hearing serves the investigative and interrogation purpose. Thus in a white collar investigation, the grand jury is comparable to a police station interrogator.

It is clear that suspicion had already focused on appellants and that they were defendants in a real sense, since the United States Attorney told appellant Gollaher that he was a potential defendant. The accusatory stage had been reached. It would be a disregard of reality to state that a person subpenaed to appear before the grand jury is not in custody or in the words of *Miranda v. Arizona,* 384 U.S. 436, 477, "otherwise deprived of his freedom of action in [a] significant way." A person under subpena is certainly not at liberty to disregard the subpena. Once he appears before the grand jury, he must answer questions or face a contempt citation. *State v. Hennessey,* (1952) 245 P. 2d 875, 195 Or. 355. A federal district court in a recent decision has held that a grand jury proceeding is a critical stage of prosecution and, in effect, is an "in custody interrogation."

Mattox v. Carson, (D.C. Fla. 1969) 295 F. Supp. 1054, 1058-1059.

In his decision, Distrrict Judge Scott stated:

> "It is argued by the respondent that the principles of *Miranda* are not applicable here because a Grand Jury proceeding is not a critical stage of prosecution. While it is true that only probable cause was being determined, and that an information could have been filed regardless of whether an indictment was returned, petitioners were the targets of investigation and were definite suspects. . . *Incriminating statements made during the Grand Jury questioning could be used against the defendants at trial. A confession of guilt made in the secrecy of a Grand Jury room would affect the whole trial.*

"The Supreme Court of the United States has already recognized that a Grand Jury proceeding can be a critical stage of a trial. [citations] According to *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the accused must be permitted to consult with his lawyer when the process has shifted from 'investigatory to accusatory'. *Escobedo, supra,* at 492, 84 S. Ct. 1758, 1765. For this court to deprive petitioners of the constitutional right to consult with counsel until after the grand jury proceedings would be tantamount to rendering worthless their Sixth Amendment right 'to have the assistance of counsel for [their] defense'.

"Respondent maintains that the contention raised by petitioners as to their right to be advised by counsel is not appropriate since there was no 'custodial interrogation' as contemplated by *Miranda.* However, the language of *Miranda* clearly shows that its principles are not confined to police station interrogation. Under that decision, 'the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. * * * Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest! *Miranda,* supra at 467, 469, 86 S. Ct. 1602, 1625.

"In *Miranda,* custodial interrogation is defined as 'questioning initiated by law enforcement offi-

cers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' *Miranda,* supra at 444, 86 S. Ct. at 1612.

"Several courts have held that interrogation of a suspect under circumstances similar to those under which petitioners were each interrogated was 'in custody interrogation'. [citations]." *Mattox v. Carson, supra,* 295 F. Supp. at 1058-1059 [Emphasis added].

Appellant challenged the illegal interrogation before the grand jury by filing a motion to dismiss the indictment. The motion was denied.

At the trial, impeaching evidence from his grand jury testimony was used against appellant Gollaher and appellant corporation. At that time counsel for defendant interposed an objection on the grounds that the questions asked appellant before the grand jury called for conclusions, and counsel stated that if appellant Gollaher had had counsel within the grand jury room, his counsel could have objected to the questions. The objection was overruled [Rep. Tr. 1081-1085, 1135]. No express objection was made to the introduction of this grand jury testimony on *Miranda* grounds. The Court of Appeals has held that the point was not preserved for appeal because of lack of an objection.

Appellants however contend that although constitutional objections may be waived by a failure to raise them at a proper time, one cannot effectively waive an unknown right and since the application of *Miranda* to grand jury investigations had not then (October and November 1966) been established as a right, it can-

not be said that appellant's failure to object to the introduction of the evidence amounted to a waiver of a known constitutional right.

Cf. Grosso v. United States, (1968) 390 U.S. 62, 71, 88 S. Ct. 709;

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975;

Hensley v. United States, (10th Cir. 1968) 406 F. 2d 481, 484.

The Court of Appeals took the position that Gollaher was adequately advised of his constitutional rights before the grand jury and waived those rights, however, the record does not bear this out. A defendant is not required to claim the privilege. The law grants him protections which he may waive, but only where the waiver is intelligently made. Waiver of constitutional rights is never presumed.

Whatever warnings of constitutional dimensions Gollaher received, he was certainly not advised that he could consult with counsel during the course of his grand jury interrogation, whether counsel was inside the grand jury room or outside of it, and he was not warned that he could refuse to testify.

The need for continuous consultation with counsel during an interrogation has been discussed by recent writers. One of them stated:

> "One of these abuses seems to be the widespread practice of subpenaing a potential defendant to testify before the grand jury and denying him the right to counsel while he undergoes questioning in the secret atmosphere of the grand jury room.

A potential defendant who is brought before the grand jury without an attorney at his side is almost helpless. He is faced with a barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective. This torrent of interrogation is, of course, directed by a skilled prosecutor, capable of utilizing the grand jury as a tool to obtain incriminating evidence from the mouth of a nervous witness. The upset and confused witness does not know whether to respond to the questions and risk having his answers used against him at a trial or claim the Fifth Amendment, creating suspicion in the eyes of the jurors and risking a contempt charge. In this atmosphere, the proceeding takes on the attributes of a Star Chamber.

"There is no comparable institution in our entire society which sanctions secret interrogation of a person 'legally' denied access to counsel.

* * *

"The situation facing the witness before the grand jury, therefore—one in which he will have 'to shift for himself'—is fraught with peril, for 'it is now universally conceded that a witness may be impeached in any subsequent trial * * * by self-contradictory testimony given by him before the grand jury. Similarly, the admissions of a party made in testifying before the grand jury are admissible against him although he does not take the stand at the trial."

Meshbesher, Right to Counsel Before Grand Jury, 41 F. R.D. 188, 190, 191.

Two other writers have also pointed out the difficulties facing the potential defendant before a grand jury:

> "Of course, counsel in advising his client how to react in the face of possible future interrogation can never anticipate every possible question and every conceivable accusation that may be put to his client. The argument, then, reduces itself to the proposition that not only should a defendant be made aware of his rights, but that he is entitled to be advised at each step of the interrogation concerning whether or not to respond and how to respond, i.e., the tactics of the defense."

Enker & Elsen, Counsel for the Suspect: *Massiah v. U.S.*, and *Escobedo v. Illinois*, 49 Minn L. Rev. 47, 64.

Thus, although the grand jury witness may be told (as was not done here) he may consult counsel outside the grand jury room, that procedure places upon him the burden of determining whether a particular question is possibly incriminating and whether he should dash out of the room to consult counsel.

This Court in *Miranda v. Arizona*, makes particular mention of the need for counsel *during* interrogation, not merely beforehand.

> "Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

Miranda v. Arizona, supra, 384 U.S. at p. 470.

c. Immunity From Prosecution.

The government forfeited its right to indict and convict appellants by subpenaing Gollaher, a potential defendant who had not waived his constitutional rights, to appear before the federal grand jury.

Compelled testimony before the grand jury of a potential defendant or an already-indicted defendant vitiates the proceedings and clothes the defendant with immunity.

Such was the holding in *United States v. Edgerton,* (D.C. Mont. 1897) 80 Fed. 374, where the district court dismissed the indictment.

In *United States v. Lawn,* (D.C. N.Y. 1953) 115 F. Supp. 674, 677, an already-indicted defendant was called before the federal grand jury, and the district judge dismissed the indictment. (Before quoting from the *Lawn* opinion, it should be made clear that since *Escobedo v. Illinois* and *Miranda v. Arizona,* the distinction between pre-indictment and post-indictment interrogation has no significance. Both are considered critical stages at which the panoply of constitutional rights protects the potential defendant.)

In *United States v. Lawn, supra,* the district judge stated (at p. 677):

> "However, upon the trial of the defendant in a criminal case, it would be a clear violation of a defendant's right against self-incrimination under the Fifth Amendment of the Constitution to com-

pel him to take the stand, testify and produce his records, relating to the matter with which he is charged. Unless he volunteers, it would invalidate the trial. United States v. Housing Foundation of America, Inc., 3 Cir., 1949, 176 F.2d 665. Title 18 U.S.C.A. § 3481 makes a defendant a competent witness *at his own request*. It is thus improper to call him as a witness without a request on his part. 8 Wigmore on Evidence, 3rd Edit., p. 393; 3 Wharton's Criminal Evidence, 11th Edit., p. 1960.

"For similar reasons, an indictment is invalid if a defendant against whom a criminal information has been filed, is called by the prosecution as a witness before the grand jury to obtain evidence tending to sustain an indictment against him, which supersedes the earlier information. Mulloney v. United States, 1 Cir., 1935, 79 F.2d 566; United States v. Miller, supra; United States v. Kimball, C.C., 117 F. 156. In neither situation is the defendant required to claim the privilege. The law grants him this protection. It is a right which he alone may waive.

"The defendants did not waive their rights. Only if they were warned of and understood their rights, consented to waive them, and were willing to testify, could they be called as witnesses. In United States v. Miller, supra [80 F. Supp. 981], the court declared:

> " 'Thus a defendant cannot by legal means be compelled to testify before a grand jury. This is so even though he fails to claim his constitutional privilege against self-incrimination, unless he waives it *after being properly warned of his privilege.*) [Emphasis added.]' "

The practice of calling potential defendants before a Federal Grand Jury was also criticized in the case of *Powell v. United States,* (D.C. Cir. 1955) 226 F. 2d 269, 274, where the court said:

> "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

The importance of securing a determination by this Court of the question raised is emphasized by the continuing practice of prosecutors to call potential defendants before the grand jury without warnings that they need not testify at all, as well as without other warnings required by *Miranda v. Arizona.* The only place in the United States where a potential defendant is compelled to answer questions without being afforded Fifth and Sixth Amendment rights is the grand jury room.

The grand jury, which had as its origin the protection of potential defendants, should not be permitted to be an instrument of coercion and unfairness.

2. The Sentencing Judge Made Defendant Gollaher Pay a Price for Testifying at His Trial and for Defending Himself by Imposing a Harsher Sentence and by Denying Probation Because Gollaher Refused to Confess His Guilt, Post Conviction. This Practice Is the Subject of a Conflict Between the Ninth and Tenth Circuits and the District of Columbia (Scott v. U.S., Feb. 13, 1969) and Fifth (Thomas v. U.S., 368 F. 2d 941) Circuits.

It is clear from the record that the trial judge expressly refused to place appellant Gollaher on probation because the court believed that Mr. Gollaher in testifying at the trial had lied and further refused to admit his guilt after conviction and before sentencing. Counsel for appellant after reviewing the pre-sentence report and Mr. Gollaher's background asked that the court grant probation for a short period of time with a suitable fine as a condition of that probation. To which the trial judge stated:

> "The Court: 'Don't you feel that probation requires that some trust be placed in Mr. Gollaher?
>
> "Mr. Klein: Yes, and I believe he is worthy of that trust.
>
> 'The Court: Except that he has already lied to the court under oath and how can I believe him in other aspects?"

Thereafter counsel recounted some of Mr. Gollaher's background and again stated that "taking of the total

picture into consideration, Mr. Gollaher is worthy of probation and the trust of the court." The court stated:

> "The Court: I fail to see it, Mr. Klein, I am sorry to say. Here is a man that still doesn't admit that he has violated the law. The first step toward rehabilitation is an admission of his faults, his willingness to start over and make amends."

Counsel then stated that there were motions pending and that it would be inappropriate and would in effect be a waiver of constitutional rights for Mr. Gollaher to make any statements on the merits of the case [Rep. Tr. 1478-1479].

In a very recent case of *Scott v. U.S.*, (No. 20, 954, D.C. Cir. Feb. 13, 1969) partially reported in 37 Law Week 2463, 2464, the court was concerned with a similar problem. Defendant had been convicted of robbery and was sentenced to a maximum term. He appealed on the ground that the record showed he would have received a lighter sentence if he had confessed the crime at the time of sentencing or had pleaded guilty. He argued, like Gollaher here, that an acknowledgement of the crime at the time of sentencing would have deprived him of rights on appeal and collateral attack.

The Court of Appeals reversed, and speaking through Judge Bazelon, stated:

> "It might be argued that the dilemma between waiving Fifth Amendment rights and receiving a harsher sentence might be eliminated by a rule making a defendant's statement at his allocution inadmissible in other proceedings. But the appellant had no such assurance in this case. The trial judge was eager for an acknowledgement of guilt

presumably because a confession might indicate repentence. But the appellant could reasonably have believed that he could show penitence—real or affected—only at the price of prejudicing his appeal, if not worse. Whether the trial judge intended or not 'to bargain thus with the defendant,' we conclude that 'the court was without right . . . to put a price on an appeal.' "

Scott v. U. S., supra, (No. 20,954, D.C. Cir.) Opinion page 7.

Judge Bazelon then went on to quote from *Thomas v. U.S.,* (5th Cir. 1966) 368 F. 2d 941, 945, 946, where the trial court imposed a heavier sentence because the defendant would not "come clean and make a breast of this thing for once and for all."

Judge Rives stated for the court in *Thomas:*

"It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial . . ., appeal, petition for certiorari, and collateral attack . . . if he chose [to confess guilt] . . ., he would elect to forego all of the above-noted post-conviction remedies [and] to confess to the crime of perjury. . . . Moreover, he would abandon the right guaranteed by the Fifth Amendment to chose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. . . .

"When [the appellant] received harsher punishment than the court would have decreed had he

waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights."

Thomas v. U.S., supra, 368 F. 2d 941, 945, 946.

Judge Bazelon pointed out that there is a conflict in the circuits between the Fifth Circuit and the Tenth Circuit on the sentencing practice followed by the trial judge, and now with the instant case, it appears that the Ninth Circuit also conflicts with the Fifth Circuit and the District of Columbia Circuit.

Judge Bazelon also pointed out that one of the problems in the *Scott* case, as also existed in the Gollaher case, is that the trial judge believed that the appellant had committed perjury on the witness stand in denying that he had committed the crime charged.

Judge Bazelon said that the theory that a person should receive additional punishment because he may have committed perjury on the witness stand deserves "emphatic rejection." The government could if it wished prosecute the appellant for perjury. In such a proceeding the appellant would have all the protections of a criminal trial, but if the trial judge imposes additional punishment for the supposed commission of perjury, he plainly denies the appellant a trial upon that offense.

The other argument, stated by Judge Bazelon, in rejecting the practice of the trial judge in the *Scott* case, was that it would stultify and discourage an accused from testifying in his own behalf.

Scott v. U. S., supra, Opinion pages 8-9.

In *United States v. Wylie,* (7th Cir. 1960) 278 F. 2d 500, 504, Judge Schnackenberg stated:

> "Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wylie was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted."

As stated by Judge Bazelon in *Scott v. U.S., supra:*

> ". . . Empirical evidence supports the proposition that judges do sentence defendants who have demanded a trial more severely. . . .
>
> "Much of this adulation for differential sentencing has been rationalized without frank recognition of the fact that whatever its advantages, the practice does exact a price from those who insist upon a trial. But the arguments in favor of differential sentencing cannot be dismissed by a wooden insistence that the exercise of constitutional rights can never be made costly. Some rights may be so vital that no deterrents to their free exercise can be tolerated. The Supreme Court has accorded such pre-eminent status to the self-incrimination privilege. . . ."

Scott v. U.S., supra, Opinion page 10.

The Supreme Court has held that a penalty may not be exacted for exercise of Fifth Amendment rights.

Spevack v. Klein, (1967) 385 U.S. 511, 515.

Gollaher paid a price for insistence upon his constitutional rights, and the judgment therefore cannot stand.

3. Where a Prosecutor Makes a Civil Agency Into His Agent, and the Federal Government's Several Involved Agencies Then Proceed to Impose a Series of Punishments and Jeopardies for Precisely the Same Alleged Acts on Precisely the Same Defendants, the Federal Government Has Thereby Committed the Constitutional Violation of "Double" Jeopardy and Punishment. Here the Jeopardy Is Not Double, but Multiple. The Violation Extends Not Only to the Guarantee Against Multiple Jeopardy and Punishment, but Also to the Broad Guarantee of Fairness, Viz., Due Process. A Review of the Events Makes This Clear.

Appellants were builders of tract homes in the low and moderate price ranges, and such homes could only be sold with home loan guarantees of the VA and FHA. During the period of time that appellants were under investigation by federal agencies, they were engaged in construction of a tract of homes in San Jose, California. All preliminary plans and specifications had been approved by the FHA, and model homes were built and a sales campaign started. Home loan guarantees from the federal government were essential to the success of this 400 home tract. Appellants estimated their profit upon the sales of the homes at $1,800,000.00. Numerous contracts for labor and material and financing and sales were entered into by appellants. While the tract was under construction, appellants received word from the FHA and VA that they could not receive home loan guarantees. Appellants requested a hearing from the

VA on the alleged charges but were told that a hearing would not be held because of a request of the United States Attorney that no hearing be held until after a proposed criminal action was disposed of. A copy of that letter was Exhibit T at trial. Since there was no relief available to appellants, they had to sell their interests at a loss approaching $1,500,000.00. Thereafter, an indictment was returned.

Appellants contend that the suspension was a penalty for certain alleged acts, and the criminal case was an attempt to impose additional penalties for the same alleged acts and transactions.

By being placed on trial for the crimes alleged in the indictment, appellants were subjected to double prosecution and double punishment.

In re Nielsen, (1889) 131 U.S. 176, 182-193, 185;

In re Snow, (1887) 120 U.S. 275, 285-286.

It has long been held that it is repugnant to due process of law to permit the same sovereignty to punish an accused twice for the same offense, and it constitutes cruel and unusual punishment under the Eighth Amendment as well.

Ex parte Lange, (1874) 85 U.S. (18 Wall.) 163, 170-178;

Trop v. Dulles, 356 U.S. 86.

This is not a situation where there are distinct civil and criminal remedies which the government may pursue. The purpose and effect of the suspension was to

punish appellants, and therefore the later criminal case was a second prosecution and a later imposition of sentence was an additional punishment for the same alleged acts.

United States v. LaFranca, 282 U.S. 568, 571-574;

United States v. Chouteau, 102 U.S. 603.

To deprive one of his livelihood constitutes punishment according to *Ex parte Garland,* 71 U.S. 333 and *Cummings v. Missouri,* 71 U.S. 277.

In *Garland,* an attorney moved for permission to practice as an attorney before the court. It was required that beforehand he take an oath that he had not voluntarily borne arms against the United States during the Civil War. He had received a presidential pardon and amnesty for any acts committed on the condition that he take the oath. He could not properly take the oath, and now argued a violation of the Fifth Amendment that no one shall be deprived of life, liberty or property without due process of law.

The Supreme Court, through Justice Field, held that the right to practice a profession is property, and stated at page 370:

> ". . . exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

Justice Field went on to say that the practice of a calling "is something more than a mere indulgence. It

is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency." (Page 370).

In the *Cummings* case, a priest refused to take the oath of loyalty. The Court said:

> "The deprivation of any rights, civil or political, previously enjoyed may be punishment; the circumstances attending and the causes of the deprivation determining this fact. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, guardian, may also, and often has been, imposed as punishment.
>
> * * *
>
> 'The theory upon which our political institutions rest is, that all men have certain inalienable rights —that among these are life, liberty and the pursuit of happiness. All avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. *Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined.*" Page 283, [Emphasis added]

Recently the Court reaffirmed the principle that deprivation of livelihood represents penalty and punishment.

Spevack v. Klein, 385 U.S. 511.

The gross unfairness and deprivation of Due Process in this case is highlighted by the fact that the civil

agencies of the government were not acting alone, but were acting not only in concert with, but at the direction of the United States Attorney.

The Fifth Amendment right against double jeopardy is a basic and absolute right. As stated by District Judge Hall:

> ". . . double jeopardy is an absolute right, it is not modified such as searches and seizures by the word 'unreasonable', it is not modified as the right of condemnation which must be for 'public use,' it is not subject to the elasticity of the phrase 'due process of law' and other modifications of other rights, and under that clause, if a person is once placed in jeopardy for an offense he simply cannot be prosecuted for that offense again, regardless of the reasonable or unreasonableness or the public interest which may bespeak a prosecution."
>
> *United States v. Armco Steel Corporation,* (D.C. Cal. 1966) 252 F. Supp. 364, 367.

The purpose of the constitutional ban on double jeopardy was explained by Justice Black in *Green v. U.S.*, (1957) 355 U.S. 184, as follows:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:
>
> '". . . the plea of auterfois acquit, or a former acquittal, is grounded on this universal maxim of

the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense.'

* * *

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." [Emphasis added.]

Green v. U.S., supra, 335 U.S. 184, 187-188.

In the instant case, without any semblance of a hearing, a hearing having been denied them, appellants were put out of business, a thriving construction business with a value of more than a million dollars. Thereafter an indictment was returned charging appellants with the same alleged acts. Forcing appellants out of business without a hearing was not only a denial of Due Process of Law, but was a deprivation of the right to earn a livelihood, a substantial punishment. The later criminal trial placed appellants in jeopardy for the same alleged acts. (It is to be noted that the conviction was only for six of the 15 counts of the indictment.) The post conviction imposition of a substantial fine and imprisonment subjected appellants to double punishment. Thus the embarrassment, expense, anxiety and insecurity spoken of by Justice Black were all part of the ordeal appellants suffered.

To dismiss the deprivation inflicted on appellants by calling the federal administrative agency action "civil" exalts labels over realties. As Justice Black further pointed out in *Green:*

> ". . . The right not be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protections are given a narrow, grudging application they are deprived of much of their significance."
>
> *Green v. U.S., supra,* 355 U.S. 184, 198.

The jeopardy here was not double, but multiple. Only by giving the great constitutional right a "narrow, grudging application" can the conduct of the government be sustained. The Fifth Amendment ban on double jeopardy as well as its insistence upon Due Process of Law demand a reversal in this case.

Conclusion.

Improper zeal of the prosecutor in this case threatens the integrity of the Bill of Rights. What this Court has accomplished in making that Bill of Rights a reality will be undermined if, as the prosecutor maintains, the grand jury room is the only place in the United States where a lone suspect may be interrogated without warning of his Fifth Amendment right against self-incrimination and without benefit of his Sixth Amendment right to counsel. What happened in the grand jury room assuredly affected the whole later trial.

Nor can the Constitution tolerate the harassment and multiple jeopardy and punishment inflicted on de-

fendants here, by first forcing them out of a million dollar business, without any hearing at the edict of the United States Attorney, and then placing them on trial on criminal charges with additional imposition of punishment.

Imposition of harsher punishment because Gollaher refused to admit his guilt, post conviction, but pre appeal, makes the assertion of constitutional rights costly. No price can be placed on the right to defend oneself and take the witness stand in one's own defense.

For all of the reasons heretofore stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GERALD H. GOTTLIEB,
EARL KLEIN,
Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Robert E. Gollaher and Gollaher Construction, Inc., a corporation, Appellants, vs. United States of America, Appellee. No. 21,633.

[August 19, 1969]

Appeal from the United States District Court for the Eastern District of California at Fresno

Before: BARNES and HAMLEY, Circuit Judges, and STEPHENS, District Judge

STEPHENS, District Judge:

The District Court had jurisdiction of the within case pursuant to Title 18 U.S.C. §§ 307, 1001 and 1010. This court has jurisdiction pursuant to Title 28 U.S.C. § 1291.

A fifteen count indictment was brought against Robert Gollaher and Gollaher Construction, Inc. and Evelyn Barbee. Barbee withdrew her plea of not guilty, entered a plea of guilty to Count Two and testified for the government at the trial. A verdict was returned on the first six counts only. After the verdict, Barbee was allowed to enter a plea of nolo contendere to Count Two. She was sentenced to one year in prison, but this was suspended and she was placed on probation for one year. All remaining counts against her were dismissed.

Appellants Robert Gollaher and Gollaher Construction were found guilty on Counts One through Six. Count One charged a conspiracy to commit an offense

against the United States or an agency thereof. 18 U.S.C. § 371. Other persons were named as co-conspirators, but were not indicted.

Count Two charged a violation of 18 U.S.C. § 1010, which provides that "whoever, for the purpose of obtaining any loan or advance of credit . . . with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance . . . makes, passes, utters or publishes any statement, knowing the same to be false . . ." has committed an offense against the United States.

Robert Gollaher was denied probation and was sentenced to two years' imprisonment on each count, the sentences to run concurrently. Gollaher was also fined $5,000.00 on each count for a total fine of $30,000.00, with a condition that if the fine were paid within the first year, one year of his sentence would be suspended. Gollaher Construction, Inc. was ordered to pay a fine of $1,000.00 on each of the six counts for a total fine of $6,000.00

Robert Gollaher was a contractor building homes in the Fresno area. He did business through three companies, to wit, Design Homes by Robert E. Gollaher, Inc., Gollaher Construction, Inc., and G & B Construction, Inc. To obtain financing, Gollaher instructed Evelyn Barbee, an employee of Gollaher Construction, Inc. to find persons who could qualify for mortgage insurance from the Federal Housing Administration (hereafter F.H.A.) or were entitled to loan guarantees from the Veterans Administration (hereafter V.A.). Persons who could qualify were paid to sign application forms which were used to secure F.H.A. insurance or V.A. loan guarantees for persons desiring to purchase

one of Gollaher's homes, but who were not entitled to either F.H.A. or V.A. financing. The application forms contained statements of intent to purchase and occupy the homes, when in fact the qualified persons who signed the applications never intended to purchase or occupy the homes involved. See 38 U.S.C. § 1804(c) and 18 U.S.C. § 1010. Deposit receipts were also prepared and submitted with the applications for financing, indicating that a deposit had been made toward the purchase of the homes involved, when in fact no such deposit had been received.

Financing was arranged through T. J. Betts Company and Central Securities Mortgage Company. These companies would transmit the documents to the V.A. and F.H.A. and would then make F.H.A. insured or V.A. guaranteed loans in the names of the persons who could qualify for F.H.A. insurance or V.A. guarantee. Actually, the loans were obtained for Gollaher's prospective purchasers who were not qualified for V.A. or F.H.A. financing.

On December 23, 1965, the Veterans Administration notified Gollaher and Gollaher Construction, Inc. that the V.A. would refuse to appraise any properties owned, sponsored or to be constructed by them and all persons acting on their behalf. The Administrator was authorized by 38 U.S.C. § 1804(b) to take such action upon finding that the methods or practices pursued in relation to the marketing of such properties were unfair or unduly prejudicial to veteran purchasers. Appellants were also notified that they had a right to a hearing upon request. On December 28, 1965, Gollaher and Gollaher Construction, Inc. were notified by the F.H.A. that all further applications for mortgage insurance

submitted by them would be rejected on the ground that they had been suspended by the Veterans Administration.

Some of the purchasers who were not qualified for the government financing moved into homes purchased from Gollaher and received payment books in which the name of a qualified applicant would appear. Payments were made in the name of the qualified applicant. In several cases, the actual purchasers defaulted in the payments and after foreclosure, a deficiency existed. The government then looked to the veterans or other qualified persons whose names appeared on the application forms.

The various reasons assigned for reversal are separately considered below:

Gollaher's Testimony before the Grand Jury

Appellants contend that "the conviction must be reversed because appellant Gollaher was compelled to testify before the grand jury after suspicion had already focused on appellants."

Appellants argue that Gollaher was in reality a defendant compelled by subpoena to testify. His position before the grand jury is equated with the position of a defendant undergoing custodial interrogation. It is contended that *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Miranda v. Arizona,* 384 U.S. 436 (1966), demand that the same safeguards be provided to witnesses before the grand jury as to persons in custody. Appellants maintain that Gollaher was not properly advised of his privilege against self-incrimination, that he was not permitted to have counsel present while testifying before the grand jury and that, therefore, the prosecu-

tion should not have been allowed to use his grand jury testimony at the trial.

It should also be noted that no objection was made to the questions on cross-examination which elicited this testimony. What the cross-examination would be on this subject was well known to defense counsel and what the testimony would be was equally well known. There is no excuse for not interposing timely objection so that the trial court could rule in the context of the examination. This point was not preserved for appeal. Appellants argue that the pretrial motion to dismiss the indictment because of what took place before the grand jury sufficiently raised the objection and preserved it on appeal. It is too apparent to require exposition that the motion was made in an entirely different context.

The argument is made that Gollaher's testimony before the grand jury was used not only to impeach Gollaher, but as affirmative evidence. In fact, the testimony was introduced as impeachment and it was effective for this purpose. The affirmative weight of this evidence was incidental to its principal purpose. Its admission into evidence was not error.

The statements made by Gollaher before the grand jury were admissible to impeach the testimony he gave at the trial. *Walder v. U.S.*, 347 U.S. 62 (1954); *U.S. v. Armetta*, 378 F. 2d 658 (2nd Cir., 1967); *Inge v. U.S.*, 356 F. 2d 345 (D.C. Cir., 1966); *U.S. v. Curry*, 358 F. 2d 904 (2nd Cir., 1965); *Bailey v. U.S.*, 328 F. 2d 542 (D.C. Cir., 1964).

It was not error to deny defendant's motion to dismiss the indictment. The record shows that Gollaher was adequately advised as to his Fifth Amendment

rights and he was not entitled to have counsel present with him while he testified before the grand jury. See Rule 6(d) of the Federal Rules of Criminal Procedure and the following cases: *In re Groban,* 352 U.S. 330, 333 (1957); *U.S. v. Luxenberg,* 374 F. 2d 241 (6th Cir., 1967); *Jones v. U.S.,* 342 F. 2d 863, 882 (D.C. Cir., 1964); *U.S. v. Wolfson,* 282 F. S. 772, 775 (S.D. N.Y., 1967); *In re Weiss,* 279 F. S. 857, 859 (S.D. N.Y., 1967); *U.S. v. Kane,* 243 F. S. 745, 753 (S.D. N.Y., 1965).

We are not here called upon to reexamine the rule announced by this court in *Groshart v. U.S.,* 392 F. 2d 172 (9th Cir., 1968), pertaining to the use, for impeachment purposes, of statements obtained from a defendant in violation of the rule announced in *Miranda v. Arizona,* 384 U.S. 436. Appellant, while present before the grand jury pursuant to a subpoena, was not then in police custody and the *Miranda* rules were for that reason not applicable to his grand jury interrogation.

Double Jeopardy

Appellants' next alleged error is that placing them on trial after suspension by the Veterans Administration constituted double jeopardy, double punishment, and cruel and unusual punishment.

The homes which were being constructed were in a price range which did not attract ordinary bank financing. Financing depended upon availability of F.H.A. mortgage insurance and V.A. loan guarantees. After the suspension by the V.A., appellants requested a hearing. The United States Attorney, however, requested that the hearing be held in abeyance until the criminal

aspects of the case were concluded. The Chief Benefits Director, pursuant to 38 C.F.R. § 36.431b and in keeping with the V.A. policy to cooperate with the Department of Justice, deferred hearing. Appellants claim that the financial pressure which resulted from the V.A. action forced the sale of their interest in a housing tract at a loss approaching $1,500,000.00 and that the United States Attorney's involvement in the suspensions rendered the suspensions criminal penalties.

The argument is without merit. Appellants have no vested right to V.A. or F.H.A. financing. Their financial problems were the product of the character of the construction and the condition of the money market. They were entitled to a hearing, but faced the possibility that it might be deferred. Deferment of such a hearing for any reason would bring about the financial squeeze which they actually did have to face.

The power given the Veterans Administration to suspend the appraisal of appellants' property was designed to protect the interest of veterans and the government where the methods or practices pursued in relation to the marketing of such properties are unfair or unduly prejudicial to purchasers. It was not designed to punish the builder.

Since the suspension was not intended to be punitive, it was not a criminal sanction and, therefore, the double jeopardy provision of the Fifth Amendment is not applicable. *Helvering v. Mitchell,* 303 U.S. 391 at 399 (1938).

Coercion of Witnesses by The Prosecution

Appellants contend that the government witnesses, to wit, Mrs. Barbee, Lloyd McDaniel and Charles Bar-

boza, were coerced into testifying against the appellants, and that this action violated appellants' rights under the Fourth and Fifth Amendments.

The charge of coercion is based upon the following testimony elicited from Barbee, Barboza and McDaniel by appellants on cross-examination in an effort to impeach the three government witnesses: Prior to March 3, 1965, Mrs. Barbee was contacted several times by agents of the Federal Bureau of Investigation, but refused to meet with them to discuss the properties involved in this case. On March 3, 1965, she was summoned before the grand jury. She was obviously a potential defendant. She was told the government was not trying to twist her arm, but that any cooperation would be made known to the court at the time of sentencing. It seems to have been assumed that she would be indicted and convicted in due course. Mrs. Barbee met with United States Attorney Miller in the morning before each day of trial.

Mr. Barboza, the general manager of Gollaher Construction, Inc., testified at the trial that in his first session before the grand jury he denied all knowledge of the matter which later ripened into the indictment. Before his next appearance before the grand jury, Barboza had a conversation with United States Attorney Miller during which Miller advised him that perjury before the grand jury was a federal crime punishable by imprisonment. During the grand jury proceeding, Barboza was also told that other witnesses had indicated to the F.B.I. that he had knowledge of the procedure used by Gollaher Construction, Inc. in purchasing G.I. eligibility for government financing. Barboza

then admitted discussing this procedure with Robert Gollaher.

Lloyd McDaniel, Gollaher's brother-in-law and one of the veterans whose eligiblity was used to obtain a V.A. loan guarantee, testified that he was interviewed by agents of the F.B.I. in February, 1964, but did not tell the truth. He was subpoenaed before the grand jury and was told he was a "witness-defendant." He appeared twice before the grand jury. At trial he testified that during his first appearance before the grand jury, he was not truthful. At this time a recess was suggested by Assistant United States Attorney Mitchell, who told McDaniel that other persons had testified before the grand jury; that he, Mitchell, believed that McDaniel was being untruthful and that McDaniel should go into a witness room and think about these matters.

McDaniel testified that this procedure upset and scared him. When he returned to the grand jury room, he was asked if he wanted to change or add to statements formerly made to the F.B.I. McDaniel testified that at the time he gave a statement to the F.B.I. he was afraid he would be arrested. The subject of a metal box was brought up. The box apparently contained information which would incriminate McDaniel. He refused to give his consent to have the box produced. He was asked if the contents would tend to incriminate him and told that he could invoke the Fifth Amendment. He was reminded of the perjury statute, and told that he had not been truthful with the grand jury.

Appellants argue that this procedure constituted coercion which violated the rights of three government witnesses and that the use of evidence so obtained to

convict appellants was a violation of appellants' rights under the Fourth and Fifth Amendments. In support of this argument, appellants cite *People v. Martin,* 45 Cal. 2d 755, 290 Pac. 2d 855 (1955), where the court suggests that a defendant's right to object to the use of evidence seized in violation of the rights of a co-defendant must rest, not on a violation of the defendant's own constitutional rights, but on the ground that the government not be allowed to profit by its own wrong and be thus encouraged in the lawless enforcement of the law.

The issue of standing of a defendant to object to the introduction of evidence seized in violation of the rights of one other than the defendant was considered by the Judges of the Ninth Circuit en banc. *Diaz-Rosendo v. U.S.,* 357 F. 2d 124 at 130 (9th Cir., 1966). Following the teaching of *Jones v. U.S.,* 362 U.S. 257 (1960) and F.R.Cr.P. 41(c), the court held that a defendant did not have standing to object to the admissibility of evidence seized in violation of the rights of one other than the defendant. See also, *U.S. v. Mancusi,* 379 F. 2d 897, 904 n. 11 (2nd Cir., 1967); *U.S. v. Bozza,* 356 F. 2d 206 at 222 (2nd Cir., 1966); *Goldstein v. U.S.,* 316 U.S. 114 at 121 (1942).

The right of witnesses to refuse to incriminate themselves is a personal right. *Bowman v. U.S.,* 350 F. 2d 913 at 915 (9th Cir., 1965). They can waive that right and their failure to assert that right is nothing about which appellants are entitled to complain.

It is also significant to note that appellants did not object to the testimony of the three government witnesses at trial, but instead attempted to impeach them

by eliciting evidence of alleged coercion on cross-examination.

Testimony of Financial Loss

Appellants maintain that they were prejudiced by the admission of testimony and remarks concerning financial loss sustained by the government and other individuals as a result of defaults by several of Gollaher's purchasers. It is argued that since evidence of financial loss was not a necessary part of a violation of 18 U.S.C. § 1001, *Morgan v. U.S.*, 301 F. 2d 272 at 275 (9th Cir., 1962); *U.S. v. Godel*, 361 F. 2d 21 at 24 (4th Cir., 1966), it should have been excluded.

Analogous objections have been raised in other cases charging a violation of 18 U.S.C. § 1001 and the statute from which § 1001 was derived, to wit, 18 U.S.C. § 80. *Bartlett v. U.S.*, 166 F. 2d 920 at 923 (10th Cir., 1948); *U.S. v. Blumberg*, 285 F. Supp. 885 at 887, n. 1 (D. Del., 1966).

Gormley v. U.S., 167 F. 2d 454 (4th Cir., 1948), is especially significant. Defendant was charged with altering several copies of a sales document presented to the War Assets Administration for shipment of a large quantity of melton cloth. The original sales document indicated a sale of 10,000 yards of cloth for which the defendant gave his check for $24,000.00. The sales document was altered to indicate the sale had been 40,000 yards at a cost of $96,000.00. The altered document was presented to the Quartermaster's Department where instructions were issued to warehousemen to fill the order and ship the goods in accordance with the altered document. The defendant had arranged to sell the large amount to a buyer from New York.

At trial the government introduced defendant's check for $24,000.00 with which the defendant paid for the 10,000 yards of cloth, defendant's bank record on the day he drew the check indicating a balance of $41.18, and evidence of the fact that the check had been dishonored. Defendant charged that this evidence was irrelevant to the actual crime charged and tended to prejudice the minds of the jurors, to which the court answers, "We think this evidence was admissible in order to give the jury a full picture of the whole transaction." (167 F. 2d at 458).

As in *Gormley v. U.S.*, this evidence helped to give the jury a full picture of the situation.

Misconduct of Prosecutor

It is alleged that the prosecution was guilty of misconduct in phrasing questions in a prejudicial manner and in making reference to the conviction of one James Tripp for an offense similar to that for which appellants were indicted.

Appellants cite several examples where the prosecution inquired about "false statements," "false practices," and "false documents." Objection was made and it is argued that the inquiries assumed things not in evidence, were leading, conclusionary and prejudicial. This manner of asking questions was conclusionary, objectionable and bad practice, but in this case not prejudicial. It did not affect substantial rights of the appellants and therefore, should be disregarded. F.R.Cr.P. 52(a).

The prosecution, after inquiring of Mr. Gollaher as to his association with Mr. Tripp, asked, "and you knew that Mr. Tripp was convicted in this court in

1965 for filing false statements to the F.H.A., didn't you?" Appellants moved for a mistrial. The court denied the motion and instructed the jury as follows: "The last question and answer [none was given] I am striking from the record. I feel that the association with Mr. Tripp would have no bearing on this man's guilt or innocence." When considered with the entire record, the weight of the other evidence against Gollaher and the court's admonition to the jury, the question does not require reversal.

Defense Inspection of Testimony before The Grand Jury

Appellants allege that they were deprived of the right of presenting their defense in that the court would not permit inspection of the transcript of the testimony of one Morgan and Knapton before the grand jury.

Knapton and Morgan were real estate brokers on the housing tracts built by Gollaher. Although they testified before the grand jury, they were not called to testify at the trial. Appellants argue that there is an implication from the prosecution's failure to call the two men that their testimony would have been helpful to the defense. Appellants maintain that they could not risk calling them as witnesses for fear they may have been impeached by their grand jury testimony, and, therefore it is argued that by refusing to allow the defense the opportunity to inspect the transcript of their testimony, appellants were deprived of the defense of potentially helpful witnesses.

Appellants rely on *Brady v. Maryland,* 373 U.S. 83 (1963) and *Dennis v. United States,* 384 U.S. 855 (1966).

The *Brady* case is distinguishable from the one at bar. Brady and a companion Boblit were tried separately and found guilty of murder. Brady testified and admitted participation in the crime, but claimed that Boblit did the killing. Prior to the trial, Brady's attorney asked to examine Boblit's extrajudicial statements. In one of these statements, Boblit admitted the actual homicide. Brady's attorney was shown some of the statements, but the confession was withheld. The court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." 373 U.S. at 87.

Appellants were in a much different position in this case. They could have called Knapton and Morgan to testify. Brady could not have called Boblit to testify for Boblit had a right to refuse to be called. Further, it is apparent that Bardy and his attorney were deceived. This is not true in the present case. Appellants knew where to find the testimony they felt may have been helpful in their defense and could have used it subject to the risk of impeachment.

Reliance on *Dennis v. U.S., supra,* is likewise misplaced. In that case the court dealt with a petitioner's contention that the trial court committed reversible error by denying a motion to require the production of the grand jury testimony of four government witnesses for examination. All four of the witnesses testified at the first trial; three of the four witnesses testified at the second trial. The Supreme Court noted that there was no justification for relying on the assumption of the Court of Appeals that it is "safe to assume" no in-

consistencies would have come to light if the grand jury testimony had been examined [384 U.S. at 874], and held that petitioners were entitled to examine the related grand jury minutes and to do so while those witnesses were available for cross-examination. The distinction between *Dennis* and the present case is clearly that Knapton and Morgan never testified at trial.

Defense Inspection of Intra-Agency Communications

Appellants claim that intr-agency communications might have shown that the F.H.A.'s attitude in pursuing the prosecution was one of bias and that it was error not to permit inspection of such communications.

While "the determination of what may be useful to the defense can properly and effectively be made only by an advocate," [*Dennis v. U.S., supra* at 875] the materials upon which such a determination is sought to be made must in the first instance be discoverable, a prerequisite absent in this case. Federal Rules of Criminal Procedure, Rule 16(b) provides in part that the discovery authorized by Rule 16 "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case. . . ." There are two exceptions. The first is the authorization of inspection of any relevant results or reports of physical or mental examinations, scientific tests or experiments made in connection with the particular case. The second relates to the right in a criminal prosecution to inspect a statement or report in the possession of the United States which was made by a government witness or prospective government witness after said witness has testified

on direct examination in the trial of the case. 18 U.S.C. § 3500. Neither exception is applicable in the present case.

Sufficiency of The Evidence

Counts Four, Five and Six of the indictment charged that appellants represented to the V.A. that a $25.00 deposit had been received toward the purchase price of properties sold by appellants while they well knew no such deposits had been received. Count One also included a reference to such deposits.

Appellants maintain that this misrepresentation was not of a material fact in that counsel for the V.A. testified that the V.A. does not require a down payment and the approval or rejection of home financing would not have turned on the existence or absence of such a deposit.

The pertinent statute, Section 1001 of Title 28, was examined in *U.S. v. Silver,* 235 F. 2d 375 at 377 (2nd Cir., 1956) and that court made the following observations:

> "Section 1001 contains two clauses. The first relates to the willful falsification or concealment by 'trick, scheme, or device' of a 'material fact;' the second covers 'false, fictitious or fraudulent statements or representations.' The indictment [as does the indictment in the present case] charged a crime under the second clause, which unlike the first, does not include the term 'material.'"

In *Fisher v. U.S.,* 231 F. 2d 99 at 102 (9th Cir., 1956), the court noted that "the language of Section 1001 seems to justify such a construction."

The case of *Brandow v. U.S.*, 268 F. 2d 559 (9th Cir., 1959), recognizes a sharp division of authority on this point. The opinion quotes with approval from the case of *U.S. v. Quirk,* 167 F. Supp. 462 at 464 (E.D. Penn., 1958), as follows:

> "[W]e believe that the conduct Congress intended to prevent by § 1001 was the willful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible. We think the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances."

In the instant case, the representations that a $25.00 deposit had been made were intended to induce the V.A., an agency of the United States, to guarantee a loan to the applicant. The representations of the application, including that a $25.00 deposit had been made, were relied upon. There were no collateral circumstances which prevented agency action as in *U.S. v. Quirk.* This is not a prosecution based upon a false statement in an application which did not produce results. It is unnecessary to speculate as to what the agency would have done with the application if the application had shown that no deposit had been made. A deposit, even if small in amount, is earnest money, an indication of the sincere intention of the applicant. The misrepresentation was calculated to make the application more appealing and if it had been known that the representation was false, the agency action would most certainly have been affected. The representations were intended to be and were material representations. The collateral

circumstance that the agency would not have insisted upon such a deposit is immaterial.

Count Two charged that appellants knowingly and willfully made a false statement to the F.H.A. to the effect that Design Homes by Robert Gollaher had received $400.00 from Lloyd McDaniel as a deposit on a home and that this was done with the intent that a loan made to McDaniel be offered to the F.H.A. for insurance. The defense was that Gollaher gave McDaniel the down payment as a wedding gift. McDaniel testified at trial that he did not pay a deposit of $400.00 toward the purchase of the home involved. Although there was testimony to the contrary and testimony to the effect that Robert Gollaher had given McDaniel money as a wedding present, the court must view the evidence in a light most favorable to the prosecution. *Glasser v. U.S.*, 315 U.S. 60 at 80 (1942).

Appellants also maintain that there was no evidence whatsoever that appellant corporation was involved in any of the transactions charged. It was the prosecution's theory that Design Homes, Inc. and G & B Construction, Inc. were subsidiaries of Gollaher Construction, Inc. and therefore the parent entity would be responsible for the actions of its subsidiaries. Appellants assert that the evidence showed that each corporation was a separate entity. In fact, the evidence was in conflict. Gollaher's testimony before the grand jury was introduced on cross-examination wherein Gollaher stated that Gollaher Construction, Inc. had two subsidiaries, to wit, G & B Construction, Inc. and Design Homes, Inc. On direct examination at the trial, Gollaher testified that Design Homes, Inc. was the corporation that did the subdivision work, built and sold

the homes involved and that Gollaher Construction, Inc. did not have anything to do with the transactions involved.

Again, viewing the evidence in a light most favorable to the prosecution, *Glasser v. U.S., supra,* there was sufficient evidence for the jury to conclude that Design Homes, Inc. was a subsidiary of Gollaher Construction, Inc. and the latter was responsible for the acts committed by Design Homes, Inc.

Sentencing Procedure

As a final contention, appellants assert that the sentencing procedure violated Robert Gollaher's right to a jury trial and his privilege against self-incrimination.

In support of this last point, appellants assert that at the time of sentencing, appellants' attorney recommended probation with a suitable fine. The trial judge rebuked appellant Gollaher for his failure to confess to the crimes of which he was convicted and took this failure into consideration in setting sentence.

Gollaher was facing the possibility of a sentence of five years and a $10,000.00 fine on each of Counts One, Three, Four, Five and Six, and a possible sentence of two years' imprisonment and a $5,000.00 fine on Count Two. He was denied probation and sentenced to two years on each count to run concurrently and a $5,000.00 fine on each count for a total fine of $30,000.00. In the sentence there was a condition that if the fine were paid within the first year, one year of his sentence would be suspended.

Suspension of sentence and probation is provided for by 18 U.S.C. § 3651. The trial court may, when satis-

fied that the ends of justice and the best interest of the public, as well as the defendant, will be served thereby, suspend the imposition or execution of a sentence and place a defendant on probation for such a period and upon such terms and conditions as the court deems best.

The power given the trial court under § 3651 to suspend a sentence and grant probation is vested in the sound discretion of the court and its refusal to suspend the sentence is not reviewable on appeal except for arbitrary or capricious action amounting to a clear abuse of discretion. *Elder v. U.S.*, 142 F. 2d 199 (9th Cir., 1944); *Mann v. U.S.*, 218 F. 2d 936 (4th Cir., 1955); *Heidrich v. U.S.*, 373 F. 2d 540 (5th Cir., 1966). Probation is granted to a defendant as a privilege and not as a right. *Bryson v. U.S.*, 265 F. 2d 9 (9th Cir., 1959).

Appellants rely on *Thomas v. U.S.*, 368 F. 2d 941 (5th Cir., 1966). The case dealt with a collateral attack pursuant to 28 U.S.C. § 2255 on the length of a sentence where prior to imposing sentence, the judge advised the defendant that he had no doubt as to his guilt and that if the defendant confessed his guilt, the court would take that into account in the length of sentence imposed. Thomas and two co-defendants were indicted for bank robbery under 18 U.S.C. § 2113(a) and (d). The two co-defendants pleaded guilty. Thomas pleaded not guilty and was tried to a jury, convicted and sentenced to the maximum term permitted, to wit,

25 years. The Fifth Circuit noted that since the defendant persisted in his claim of innocence, the colloquy prior to the imposition of sentence did not ripen into an actual infringement on his Fifth Amendment rights. The court, however, vacated the sentence, giving the District Judge an opportunity to again sentence the defendant.

This case presents a dilemma which every trial judge faces at the time of sentence. It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault. In the present state of the criminal law, there is no doubt that punishment is still a consideration in the imposition of sentence, especially where non-violent or economic crimes are involved. But to the extent that rehabilitation is the objective, no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence.

If the trial judge makes no mention of his thoughts on this subject, any sentence within legal limits will stand against attack. But, if the judge tells the defendant what he has in mind, the judge can anticipate an attack upon the sentence similar to the one at hand. No matter how artfully it may be put, the defendant will know that if he acknowledges that he has come to recognize his guilt, this may well result in a lesser sentence. He is then up against a hard choice of whether to forego some potential attacks upon the judgment or face a stiffer sentence. If he makes the latter

choice, and his conviction is upheld, he is forced to rely upon the action of the Board of Parole. If he is in fact innocent, then he must have faith that this will ultimately be established and act accordingly. On the other hand, after the defendant has been convicted, the judge must proceed upon the basis that the defendant is guilty.

Justice is better served by a forthright disclosure of the state of mind of the judge. While the considerations thus exposed are difficult, at least the defendant has the advantage of knowing what they are and can make his decisions according. A proper sentence takes into consideration the kind of crime committed and the kind of man who committed it. To belabor a distinction between the considerations just discussed and a sentence which is in part imposed as a penalty for going to trial would be a waste of time.

Gollaher chose to insist upon his innocence. The judge, bound by the jury's verdict and apparently also being firmly convinced by the evidence that Gollaher was guilty, proceeded accordingly. He had before him a man unwilling to take the first step toward rehabilitation and he imposed sentence accordingly. Gollaher's Fifth Amendment rights were not infringed.

Judgment affirmed.

Order.

United States Court of Appeals, for the Ninth Circuit.

Robert E. Gollaher and Gollaher Construction, Inc., a corporation, Appellants, vs. United States of America, Appellee. No. 21,633.

[August 19, 1969]

Before: BARNES and HAMLEY, Circuit Judges, and STEPHENS, District Judge

The panel as constituted in the above case has unanimously voted to deny the petition for a rehearing, and to reject the suggestion for a hearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The said panel has withdrawn the original opinion in this case, dated December 19, 1968, and filed an amended opinion in lieu thereof.

APPENDIX B.

Amendment V.

. : . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . .; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Amendment VIII.

. . . nor cruel and unusual punishments inflicted.

Title 18 U.S.C. Sec. 3481.

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. . . .

(June 25, 1948, c. 645, 62 Stat. 833)